(17,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 297.

L. J. BRYAN, AS MARSHAL, FOR THE USE OF CREDITORS, PETITIONER,

vs.

LOUIS BERNHEIMER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

In re D. ABRAHAM, Bankrupt.

LOUIS BERNHEIMER, Appellant,
versus
L. J. BRYAN, Marshal for Use of Creditors, Appellee.

Be it remembered that heretofore, to wit, on the 18th day of January, 1899, a transcript of the record of the above-styled cause from the district court of the United States for the middle district of Alabama was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following, to wit:

1 In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

SATURDAY, *December 24th*, 1898.

Present and presiding: The Hon. John Bruce, judge of the district courts of the United States for the northern and middle districts of Alabama.

The following proceedings were had in the matter of—

A. C. BARLER MANUFACTURING COMPANY ET AL.
vs.
D. ABRAHAM, Alleged Bankrupt. } Creditors' Petition.

To the Honorable John Bruce, judge of the district court of the United States for the middle district of Alabama:

The petition of A. C. Barler Manufacturing Company, a corporation organized under the laws of the State of Illinois and with its principal place of business in the city of Chicago, county of Cook, and State of Illinois; also the petition of the F. H. Lawson Co., a corporation organized under the laws of the State of Ohio, and with its principal place of business in the city of Cincinnati, county of Hamilton and State of Ohio; also the petition of C. T. Ham Manufacturing Co., a corporation organized under the laws of the State of New York, and with its principal place of business in the city of Rochester, county of Monroe and State of New York; also the petition of the American China Co., a corporation organized under the laws of the State of Ohio, and with its principal place of business in

the town of Toronto, county of Jefferson a-d State of Ohio;
2 also the petition of H. L. Judd & Co., a corporation organized under the laws of the State of New York, and with its principal place of business in the city of New York, county of New York and State of New York, respectfully showeth:

That each of said petitioners and all of them are creditors of D. Abraham, who, for a period of one year and more next preceding the date of the filing of this petition, has resided at Montgomery, in the county of Montgomery, State of Alabama, and district aforesaid; that each of your petitioner's demands is provable against the said D. Abraham in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898; that petitioners believe that said D. Abraham owes debts to an amount largely exceeding the sum of five thousand dollars; that the demand of your petitioner, A. C. Barler Mfg. Co., is for to wit: $215.93; that the demand of your petitioner The F. H. Lawson Co., is for to wit: $161.90: that the demand of your petitioner C. T. Ham Mfg. Co., is for to wit: $123.83; that the demand of your petitioner, H. L. Judd & Co., is for to wit: $144.55; that the demand of your petitioner, The American China Company is for to wit: $150.55. That the aggregate amount of your petitioners' demands against the said D. Abraham, exceeds the amount of five hundred dollars, and are founded each upon an open account against the said D. Abraham, made and entered into and incurred as follows, to wit:

A. C. Barler Mnfg. Co., Sept. 22nd, 1898.
The F. H. Lawson Co., Sept. 15th, 1898.
C. T. Ham Mnfg. Co., March 17th, 1898.
American China Co., August 5th, 1898.
H. L. Judd & Co., August 24th, 1898.

And your petitioners further represent, that within the four calendar months next preceding the date of this petition, the said D. Abraham did commit an act of bankruptcy within the meaning of said act, to wit: In that the said D. Abraham did heretofore to wit, on the 29th day of October, A. D. 1898, make a general assignment for the benefit of his creditors, which said assignment was on that day filed in the office of the judge of probate of the county of Montgomery, State of Alabama and in the said district aforesaid.

Wherefore your petitioners pray that he, the said D. Abra-
3 ham, may be declared a bankrupt, and that subpœna may issue to the said D. Abraham to appear and plead to this petition; and that his property may be distributed according to law; and that such further proceedings may be had thereon as the law in such cases provides.

A. C. BARLER MANUFACTURING CO.,
THE F. H. LAWSON CO.,
C. T. HAM MANUFACTURING CO.,
AMERICAN CHINA CO.,
H. L. JUDD CO., *Petitioners*,
By MERTENS & WILKINSON, *Their Attorneys.*

MERTINS & WILKINSON, *Attorneys.*

Oath to Foregoing Petition.

UNITED STATES OF AMERICA,
The Middle District of Alabama, } ss:

I, G. F. Mertins, do hereby make solemn oath that I am a member of the law firm of Mertins & Wilkinson, whose names are signed as attorneys for the foregoing petitioners, and by whom the said petitioners sign as their attorneys, and that the statements contained in the foregoing petition are true according to the best of my knowledge, information and belief.

G. F. MERTINS.

Subscribed and sworn to, before me, this, the 7th day of November, A. D. 1898.

J. P. DIMMICK,
Deputy Clerk U. S. Dist. Court, Mid. Dist. of Alabama.

Filed Nov. 7, 1898.

J. W. DIMMICK, *Clerk.*

Adjudication.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In the Matter of A. C. BARLER MFG. CO. ET AL.
vs.
D. ABRAHAM, by Whom a Petition for Adjudication of Bankruptcy was Filed against said D. Abraham on November 7th, 1898, in said Court.

At Montgomery, in said district, on the 12th day of December, 1898, upon good proof before me made and taken, I, John
4 Bruce, judge of said district court, do find that the said D. Abraham has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and I do hereby declare and adjudge him a bankrupt accordingly.

JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.50 p. m.

J. W. DIMMICK, *Clerk.*

Petition for Order for Marshal to Take Charge of Property.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Your petitioners, the undersigned creditors of D. Abraham, the bankrupt in this cause, respectfully show unto your honor that heretofore to wit: on the 12th day of December, 1898, upon a petition heretofore filed by them in this cause, the said D. Abraham was by this court adjudicated a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States." That on to wit: the 29th day of October, 1898, and prior to said adjudication, the said D. Abraham executed and delivered unto H. C. Davidson a deed of assignment by which he conveyed unto said Davidson all of his property and effects for the equal benefit of his creditors. That upon the delivery of said deed of assignment to him the said H. C. Davidson entered upon the execution of said trust. That afterwards, as required by the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee in the office of the register in chancery of Montgomery, Alabama, by which inventory it is shown that the estate of the said D. Abraham, consisted mainly of a stock of goods, wares, merchandise and book accounts located in a storehouse number 106 Dexter avenue. That appraisers were appointed by the said register in chancery to appraise said property, and in accordance with said appointment, they accordingly appraised all the effects of the said D. Abraham and made a return thereof to said chancery court. That the appraisement of said property is fixed by said appraisement is the sum of to wit, $7,900.00.

That on to wit the 7th day of November, 1898, your petitioners filed in this court their original petition praying that said Abraham be adjudicated a bankrupt upon the ground that he had executed and delivered said deed of assignment and upon the filing of said petition in this court, your petitioners are advised by counsel and therefore aver that this court obtained jurisdiction over said estate of said Abraham, and it was the duty of the said H. C. Davidson as assignee of said Abraham, to hold all of the property and effects of the said Abraham in his possession, subject to the orders and decrees of this court; but the said Davidson disregarding the authority and jurisdiction of this court, proceeded to sell and dispose of said property, and did dispose of the same for a sum greatly less than the appraisement as made by said appraisers. That the purchasers of said property have been in possession of the said stock of goods, wares and merchandise for several days, selling and dis-

posing of the same at retail trade and at such prices as said purchasers claim to be bankrupt prices. Your petitioners are informed and believe and upon such information aver and state that said property was sold for greatly less than its value and that unless this court makes an order requiring the said property to be taken immediate possession of, that your petitioners and all other creditors of the said Abraham will be greatly damaged thereby and the *pro rata* share to which they are entitled out of the effects of the said D. Abraham will be greatly lessened.

Your petitioners therefore pray that your honor make an order requiring L. J. Bryan, the marshal of the middle district of Alabama, to take charge of all of the property and effects belonging to the said D. Abraham at the time of the making of his deed of assignment to the said H. C. Davidson, wherever the same may or can be found, and further requiring the said H. C. Davidson to deliver to the said L. J. Bryan as marshal the books of accounts, papers, choses in action and any other property or effects which may be in his possession belonging to the said D. Abraham, and further authorizing the said L. J. Bryan as marshal to take possession of all of the property sold by the said H. C. Davidson as assignee to L. Bernheimer or to any one else, and which is particularly located in said storehouse
6 known as No. 106 Dexter avenue, in the city of Montgomery, Alabama; and that the said L. J. Bryan as marshal be required to hold all of said property so coming into his possession until the further orders of this court.

A. C. BARLER MFG. CO.,
C. T. HAM MFG. CO.,
THE F. L. LAWSON CO.,
AMERICAN CHINA CO.,
H. L. JUDD & CO.,
By G. F. MERTINS, *Their Attorney.*

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

Before me, John Bruce, judge of the United States circuit and district court for the middle district of Alabama, personally appeared G. F. Mertins, who being by me first duly sworn, deposes and says that the creditors whose names are signed as petitioners to the above and foregoing petition are all non-residents of the State of Alabama; that he is the duly authorized and lawful attorney of said named petitioners and that he as such attorney states that the allegations in the foregoing petition wherein the same are alleged as facts, are true and that the allegations alleged upon information and belief are believed to be true.

G. F. MERTINS.

Subscribed and sworn to before me this, the 12th day of December, 1898.
JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.53 p. m.

J. W. DIMMICK, *Clerk.*

Order for Marshal to Take Possession of All the Property of D. Abraham, and Demand and Receive from H. C. Davidson, Assignee, Books of Accounts, etc.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

The petition of A. C. Barler Manufacturing Co. *et al.*,
7 wherein they pray for an order in said cause requiring L. J Bryan, the marshal of the middle district of Alabama, to take possession of the property of the bankrupt in this cause, coming on this day to be considered by the court, and it appearing from said petition that after the filing of the original petition in this cause praying that said Abraham be adjudicated a bankrupt, that H. C. Davidson, to whom the said D. Abraham had, before the filing of the original petition, made a deed of assignment for the benefit of all of the said Abraham's creditors, did sell and dispose of certain property and effects of said D. Abraham for a sum greatly less than its value and without any authority or direction from this court, and that said property is now in possession of the purchasers and being disposed of by them, and it further appearing to the court from said petition, that the creditors of the said D. Abraham will be greatly damaged unless said property is taken possession of by this court, and it further appearing from said petition that it is necessary to the interest of the creditors of the said D. Abraham that this court take possession of all the property and effects of the said D. Abraham, now therefore it is the opinion of the court that said petition should be granted, and it is accordingly ordered, adjudged, and decreed that L. J. Bryan, the marshal for the middle district of Alabama, take immediate possession of all the property and effects owned by the said D. Abraham at the time of the making of said deed of assignment wherever the same may or can be found, and further that he demand and receive from H. C. Davidson as assignee the books of accounts, papers or any other effects of said Abraham which may be in the possession of the said Davidson as assignee, and further that he demand, receive and take possession of all the property sold by the said Davidson as assignee to L. Bernheimer, or any one else, and which may now be particularly located in that certain storehouse on Dexter avenue in the city of Montgomery, known as No. 106; and that the said L. J. Bryan as such marshal, hold all of such property so coming into his possession until the further orders of this court.

Dated this December 12, 1898.

JOHN BRUCE, *Judge.*

Filed Dec. 12, 1898, at 4.50 p. m.

J. W. DIMMICK, *Clerk.*

8 *Order to Louis Bernheimer to Propound Claim within Ten Days.*

United States District Court for the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

This cause coming on to be heard on the petition of the marshal for instructions in reference to goods seized by him under a former order of this court, and the same being considered by the court, it is ordered that Louis Bernheimer be notified to appear before this court within ten days from the date hereof, and propound any claim he has to the goods so seized, or to any part thereof, or failing therein, that he will be decreed to have no claim or right thereto.

The marshal is directed to retain possession of all said goods until further orders of this court.

The clerk of this court will issue and cause to be served on said Bernheimer a copy of this order.

JOHN BRUCE, *Judge.*

Filed Dec. 13, 1898, at 11.50 a. m.

J. W. DIMMICK, *Clerk.*

Petition of Creditors for Order to Require L. Bernheimer to Turn Over Proceeds of Sale, etc.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

A. C. BARLER MANUFACTURING CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Your petitioners, the undersigned creditors of D. Abraham, respectfully show unto your honor that on, to wit, the 29th day of October, 1898, the said D. Abraham did make and deliver a deed of assignment to H. C. Davidson, who is a resident citizen of Montgomery, city and county and State of Alabama and district aforesaid. That thereafter on, to wit, the 7th day of November, 1898, your petitioners did file in this honorable court a petition alleging

9 that the said D. Abraham had committed an act of bankruptcy in executing said deed of assignment and asked that the said D. Abraham be declared and adjudged a bankrupt under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States." That thereafter, to wit, on the 12th day of December, 1898, said petition coming on to be heard, after a consideration of the evidence, the said D. Abraham was by this court duly adjudged a bankrupt within the meaning of said act aforesaid.

Your petitioners further show that, after the filing of their said petition in bankruptcy against the said D. Abraham and in disre-

gard of the proceedings therein pending, the said H. C. Davidson did, as your petitioners are informed and believe, on or about to wit, the 17th day of November, 1898, turn over to and deliver to one L. Bernheimer, all of the stock of goods which belonged to the estate of the said D. Abraham, and which were located in storehouse No. 106 Dexter avenue, in the city of Montgomery, Alabama, said district aforesaid. That thereafter the said L. Bernheimer, who is a resident citizen of the city and county of Montgomery, State of Alabama, and said district aforesaid, did, in disregard of the proceedings pending in this court, proceed to sell, transfer and deliver, largely for cash, said stock of goods as aforesaid. Your petitioners are informed and upon such information show, that the said stock of goods at the time the said Bernheimer took possession thereof, was worth to wit: the sum of about $10,000.00. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer sold large quantities of said goods while the same was in his possession to wit: from November 17th, 1898, up to and during December 12th, 1898, when the balance of said stock was taken by an order of this court into the hands of the marshal of this court. Your petitioners are informed and believe that the said L. Bernheimer received from said sales and transfers of goods which belonged to the estate of said D. Abraham, large sums of money. Your petitioners are informed and believe, and upon such information show, that the said L. Bernheimer, at the time he took possession of said stock of goods, had knowledge of the proceedings in bankruptcy pending in this honorable court against the said D. Abraham. Your petitioners are advised by counsel and upon such advice and information show that the said L. Bernheimer, as against these petitioners in bankruptcy, did not and could not acquire title to the property of the said D. Abraham, and that said monies so received by the said L. Bernheimer from sales and transfers of said property and goods belongs to the estate of the said D. Abraham, bankrupt.

The premises considered, your petitioners pray that an order may be issued by this honorable court directed to said L. Bernheimer, calling on him to file with the referee in bankruptcy, on a day named, a sworn statement of all monies which the said L. Bernheimer has received from the sale or transfer of said goods of D. Abraham, owned by him at the time of making his said deed of assignment, as well as such evidences of indebtedness as he may have received from any one for such sales, and that the said referee hold a reference to ascertain and report the correctness of such statement and await the further orders of this court.

A. C. BARLER MFG. CO.,
THE F. H. LAWSON CO.,
C. T. HAM MFG. CO.,
H. L. JUDD & COMPANY,
AMERICAN CHINA COMPANY,
By G. F. MERTINS, *Their Attorney.*

G. F. MERTINS, *Attorney.*

District Court of the United States, Middle District of Alabama.

Personally appeared before me J. P. Dimmick, deputy clerk of said court, G. F. Mertins, who is known to me and who being by me first duly and legally sworn, says on oath that he is attorney for the above-named petitioners and that the facts set forth in the foregoing petition which are stated as true, are true, and where they are stated upon information and belief, they are believed to be true.

G. F. MERTINS.

Sworn to and subscribed before me this, the 17th day of December, 1898.

J. P. DIMMICK,
Deputy Clerk.

Filed Dec. 17, 1898, at 1.00 o'clock.

J. W. DIMMICK, *Clerk.*

11 *Answer of L. Bernheimer to Petition for Order to Show Cause.*

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

Answer of L. Berheimer, claimant, to petition requiring him to account for and turn over to the marshal proceeds of sale of certain goods, etc.

The claimant, Louis Bernheimer, respectfully represents to the court, that as purchaser of the stock of goods formerly belonging to said bankrupt, under a sale thereof made by H. C. Davidson, to whom said bankrupt had assigned said goods, he entered into the possession thereof; that while in such possession, and in the regular course of trade and before the marshal of this court, in obedience to its order heretofore issued, seized said goods, claimant sold a portion thereof and received the proceeds of such sales; that the daily sales made by him of such goods were as follows:

Nov.	18	$39.15
	19	155.60
	21	310.50
	22	202.20
	23	189.65
	24	127.30
	25	138.10
	26	141.10
	28	83.05
	29	166.85
	30	107.70
Dec.	1	209.60
	2	114.90
	3	104.00

5.....	145.50
6.....	123.00
7.....	74.00
8.....	144.75
9.....	25.00
10.....	62.25
12.....	104.20
	$2,768.40

12 Amounting in the aggregate to two thousand seven hundred, sixty-eight and $\frac{40}{100}$ dollars; that at the time of the purchase by claimant from said Davidson, he also bought the exemptions allowed by law to said bankrupt under the laws of the State of Alabama, and under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898. The amount of said exemption is one thousand dollars, which claimant, as such purchaser from said bankrupt, claims as exempt from any process for the payment of the debts of said bankrupt. Claimant claims all of said goods as his own under said purchase, as stated in his claim filed under the order of this court, on the 22nd day of December, 1898, but which was decided against him by this court on said date. And this answer is made without any prejudice to his claim to said goods, but as a part of the proceedings on his said propounded claim; that he has paid out of said sales for expenses of clerks, insurance and other necessary expenses the sum of three hundred and ten and $\frac{19}{100}$ dollars and returned twelve and $\frac{50}{100}$ dollars to purchasers, leaving a net balance of $1,434.80.

Respectfully submitted.

LOUIS BERNHEIMER.

UNITED STATES OF AMERICA,
Middle District of Alabama.

Louis Bernheimer, the above respondent, this day appeared before me, and made oath that he knows the contents of the above answer, and that the statements made therein are true.

LOUIS BERNHEIMER.

Sworn to and subscribed before me this 24th day of December, 1898.

HUGH NELSON,
Notary Public, Montgomery County, Alabama.

Filed Dec. 24, 1898, at 11.01 a. m.

J. W. DIMMICK, *Clerk.*

Demurrer to Claim of L. Bernheimer—Refiled to Answer to Rule.

In the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

13 A. C. BARLER MFG. CO. ET AL.
vs.
D. ABRAHAM, Bankrupt.

Come the petitioners and demur to the answer of L. Bernheimer, filed in this cause, in which the said Bernheimer propounds his claim to certain goods seized by the marshal of this court under a former order of this court, and for grounds of demurrer, assign the following:

1st. Because said answer fails to show any title to the said L. Bernheimer to the property in question which would be good as against the rights of these petitioning creditors.

2nd. Because said answer shows on its face that the said sale, alleged to have been made by the said H. C. Davidson, as assignee of the said D. Abraham, to the said L. Bernheimer, was made after the petition in this cause was filed and after this honorable court had acquired jurisdiction of the property in question.

3rd. Because it shows on its face that, at the time of the alleged sale from the said Davidson as assignee to the said L. Bernheimer, both the said Davidson as assignee, and the said L. Bernheimer had actual knowledge of the former filing of the original petition in this cause by your petitioners and of the proceedings thereon pending.

4th. Because the said L. Bernheimer attempts by and through said answer to show title in himself as paramount to the rights of these petitioning creditors of the said D. Abraham, by showing that he claims through a sale from H. C. Davidson as assignee to him and that the title of the said Davidson was acquired through a deed of assignment from the said D. Abraham to him, the said Davidson, which said deed of assignment was an act of bankruptcy under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.

5th. Because the said L. Bernheimer attempts by and through said answer to claim title as paramount to the rights of these petitioning creditors to the property in question by showing that he claims through a certain deed of assignment, the making of which was an act of bankruptcy and void as to these petitioning creditors of the said D. Abraham.

6th. Because the said L. Bernheimer attempts by and through said answer to set up a superior title in a bankruptcy court
14 as against the petitioning creditors of one D. Abraham, by claiming through a deed of assignment from the said D. Abraham to one H. C. Davidson and a sale from the said Davidson to himself, and the answer shows on its face that the said Bernheimer

attempts to claim title through an instrument, the execution of which was an act of bankruptcy.

7th. Because the said answer of the said L. Bernheimer shows on its face that the said L. Bernheimer has no title to the property in question against the rights of these petitioning creditors.

8th. Because by and through said answer the said L. Bernheimer asks this honorable court to settle and decide certain questions between the said L. Bernheimer and the said H. C. Davidson as assignee, concerning certain dealings had between the two, and said answer and petition shows on its face that this court has not jurisdiction to try and determine the said questions.

Wherefore, etc.

G. F. MERTINS,
Attorney for Petitioning Creditors.

Filed December 22, 1898, at 10.30 a. m.
J. W. DIMMICK, *Clerk.*

Refiled December 24, 1898.
J. W. DIMMICK, *Clerk.*

Claim of L. Bernheimer.

In the United States District Court for the Middle District of Alabama, Sitting in Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

And now comes Louis Bernheimer and in obedience to the command of said court, issued on the 13th day of December, 1898, and served on said Bernheimer on said date, commanding him to appear before said court and propound his claim to the goods seized by the marshal of said court under a former order of said court in the said bankrupt proceedings, and propounds his claim thereto, as follows:

That on, to wit, the 29th day of October, 1898, the said David Abraham made a general assignment of all of his property, including said goods seized by said marshal, while in the possession of claimant, for the benefit of his creditors; that one H. C. Davidson was named as assignee under said assignment and was, by the term thereof, relieved of giving any bond as such; that on the 7th day of November, 1898, certain creditors of the said Abraham filed their petition in this court, asking that said Abraham be adjudged a bankrupt; that after said day and date the same creditors filed their petition in this court praying that said H. C. Davidson, as such assignee, be required to appear before said court and show cause why he should not be restrained from selling the said goods so assigned to him. That in obedience to the order issued by said court, said Davidson did appear before the said court, and showing cause satisfactory to the court, said rule was discharged, and said court declined to make the order prayed for restraining him from selling said goods on the ground that said petition was

not sworn to and no bond given, and said petition was dismissed without prejudice; that thereupon said Davidson, as such assignee, proceeded to sell said goods at public auction for cash in the city of Montgomery; that this claimant being advised by counsel learned in the law and who were perfectly conversant with all the facts in the case, bought the said goods from the said Davidson at and for the price of three thousand five hundred dollars, which was a fair, just and reasonable price therefor; that claimant paid the said Davidson, as such assignee, the full sum of three thousand five hundred dollars in cash for said goods and went into immediate possession thereof, and has been in the possession of the same until he was deprived thereof by the said marshal, under the orders of this court; that claimant never intended to interfere in any way with the process of this court or with any property of said bankrupt, but was advised that he was at liberty to purchase said property under the sale made by said Davidson; claimant represents to this honorable court that, if he is deprived of these goods and the said Davidson is allowed to keep the money paid him by claimant as the purchase price of said goods, claimant's position in the premises will be one of great hardship and loss to him; that under the terms of said assignment said Davidson will be compelled to pay the money paid by claimant to him for such goods to the creditors of the said Abraham, including the said creditors who petitioned to have said Abraham declared a bankrupt, and the consequences will be that both the goods which the complainant purchased, in perfect good faith and by advice of counsel, will be held and
16 sold again for the benefit of said creditors and the money which claimant paid for said goods will also be used and paid out for their benefit.

Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also, that, in default of such order, or if he is mistaken in the relief prayed for, that your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant, as purchase-money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods.

Respectfully submitted.

LOUIS BERNHEIMER.

UNITED STATES OF AMERICA,
State of Alabama, Montgomery County.

On this, the 20th day of December, 1898, personally appeared before me, Louis Bernheimer, the claimant in the above claim, who made solemn oath that he had read the foregoing claim and knows the contents thereof, and that the same is true, of his own knowledge.

LOUIS BERNHEIMER.

Sworn to and subscribed before me this, the 20th day of December, 1898.

HUGH NELSON,
Notary Public, Montgomery Co., Ala.

Filed Dec. 22, 1898, at 10.30 a. m.

J. W. DIMMICK, *Clerk.*

Order on Claim of L. Bernheimer.

In the United States District Court for the Middle District of Alabama. In Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

17 Claim of Louis Bernheimer to certain property and goods seized by the marshal under order of the court and to the proceeds of sales of certain other goods sold by said Bernheimer.

The matter of the claim of Louis Bernheimer to certain goods in the possession of the marshal of this court, and to the proceeds of the sales of other goods made by said Bernheimer, belonging to the estate of said bankrupt, coming on this day to be heard on the said claims and on the demurrers thereto filed by the petitioning creditors in said bankrupt proceedings; it is considered by the court that the said demurrers be, and the same are hereby, sustained, and the said Bernheimer declining to amend or plead further, and facts being made to appear to the satisfaction of the court, it is ordered, adjudged and decreed that the said Louis Bernheimer acquired no title to the said goods or to the proceeds of the sales thereof made by him under the purchase of said goods from H. C. Davidson, as assignee of said bankrupt, superior to the title of the creditors of said bankrupt's estate. It is further ordered that the said Louis Bernheimer pay over to the marshal of this court, to await the further orders of this court, all the proceeds of the sales (as may be ascertained by the referee and approved by the court as stated hereinafter), made by him of any of the goods purchased by him of said H. C. Davidson, as assignee of said bankrupt, D. Abraham. And that it be and is hereby referred to H. Booth, Esq., referee, to hold a reference giving all parties due notice and ascertain and report to this court the amount of such proceeds.

Dec. —, 1898.

JOHN BRUCE,
Judge of the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

Filed Dec. 24, 1898, at 11.30 a. m.

J. W. DIMMICK, *Clerk.*

Application and Order Granting Appeal and Supersedeas.

In the District Court of the United States for the Middle District of Alabama. In Bankruptcy.

In re DAVID ABRAHAM, Bankrupt.

Claim and intervention of Louis Bernheimer.

18 The above-named claimant and intervener, Louis Bernheimer, conceiving himself aggrieved by the order of the court, entered on the — day of December, 1898, in the above-entitled proceedings, doth hereby — appeal and supersedeas from said court's order to the circuit court of appeals of the United States for the fifth circuit, and he prays that his appeal and supersedeas may be allowed; and that a transcript of the record and proceedings, and papers upon which said order was made, duly authenticated, may be sent to the said circuit court of appeals for the fifth circuit of the United States.

GRAHAM & STEINER,
GORDON MACDONALD,
Attorneys for Claimant and Appellant.

And now, on December 24th, 1898, it is ordered that the appeal and supersedeas be allowed as prayed for.

JOHN BRUCE,
Judge of the District Court of the United States for the Middle District of Alabama, Sitting in Bankruptcy.

Filed Dec. 24, 1898, at 11.20 a. m.

J. W. DIMMICK, *Clerk.*

Supersedeas Bond.

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

In re DAVID ABRAHAM, Bankrupt.

Know all men by these presents, that we, Louis Bernheimer and National Surety Company, are held and firmly bound unto L. J. Bryan, as marshal of the middle district of Alabama, and to his successors in office, for the use of the creditors of the estate of D. Abraham, bankrupt, now being administered in said court, in the penal sum of eight thousand dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly, severally and firmly by these presents.

Sealed with our seals, and dated this 24th day of December, 1898.

The condition of this obligation is such, that whereas, on the

24th day of December, 1898, in the matter of the claims of
19 the above-bound Bernheimer to certain goods in the hands of the marshal of said court, seized by said marshal as the goods of said bankrupt estate, and to the proceeds of certain sales made by said Bernheimer of goods formerly the property of said bankrupt, a judgment was rendered by said district court, sitting in bankruptcy, against the said Bernheimer and adjudging that he had acquired no title to such goods and the proceeds of the sales thereof, as against the creditors of said bankrupt estate;

And whereas, the said Bernheimer has prayed for and taken an appeal and supersedeas from said judgment to the circuit court of appeals, which same has been granted on his entering into this bond, and the said property in the hands of said marshal has been turned over to said Bernheimer:

Now, therefore, if the said Louis Bernheimer shall prosecute the said appeal to effect, or failing therein, shall pay all costs and damages which any person may sustain by the said appeal, then this obligation shall be void, otherwise, to remain in full force and effect.

LOUIS BERNHEIMER. [L. S.]
NATIONAL SURETY CO. [L. S.]
ROB'T E. STEINER,
Resident Vice-President.

Attest: R. J. CHAMBERS,
Res'd't Ass't Sec'y.

Approved this 24th day of December, 1898.
JOHN BRUCE, *Judge.*

Filed Dec. 24, 1898, at 1.20 p. m.
J. W. DIMMICK, *Clerk.*

Assignment of Errors.

In the District Court of the Middle District of Alabama. In Bankruptcy.

In re D. ABRAHAM, Bankrupt.

L. BERNHEIMER, Intervener,
vs.
L. J. BRYAN, Marshal, etc.

To the Honorable John Bruce, judge of said court:

L. Bernheimer, the plaintiff and intervener in the above-
20 entitled proceedings, respectfully showeth unto your honor: That on, to wit, the 24th day of December, 1898, an order and judgment was made in said cause decreeing and adjudging that the said intervener and plaintiff had no title to the goods and to the proceeds of the asale of portion thereof, set out and described in said proceedings.

The said intervener having prayed an appeal as required by law from said order and judgment, to the United States circuit court of

appeals for the fifth circuit, and pray- for a reversal of said decree and submit- the following assignment of error:

1. The court erred in sustaining the first ground of demurrer to the claims of L. Bernheimer, intervener.
2. The court erred in sustaining the second ground of the demurrer to said claims.
3. The court erred in sustaining the third grounds of demurrers to said claims.
4. The court erred in sustaining the fourth grounds of demurrer to said claims.
5. The court erred in sustaining the fifth grounds of demurrer to said claims.
6. The court erred in sustaining the sixth ground of demurrer to said claims and answer.
7. The court erred in sustaining the seventh ground of demurrer to said claims.
8. The court erred in sustaining the eighth ground of demurrer to said claim and answer.
9. The court erred in rendering the order or judgment on said claims and answer as the same was rendered.

And the said intervener, L. Bernheimer, prays all necessary orders and process in the consideration and reversal of said order and judgment in the circuit court of appeals for the fifth circuit.

R. E. STEINER,
GORDON MACDONALD,
His Attorneys.

Filed Jan. 14, 1899, at 9.50 a. m.

J. W. DIMMICK, *Clerk.*

Citation.

The United States of America — L. J. Bryan, marshal, etc.:

You are hereby cited to be and appear before the United
21&22 States circuit court of appeals, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to an order of appeal granted and filed in the clerk's office of the district court of the United States for the middle district of Alabama, wherein L. Bernheimer is appellant, and you are the appellee, to show cause, if any you have, why the judgment or order rendered against the appellant, as in said order of appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. John Bruce, judge of the district court of the United States, this 11th day of January, 1899.

JOHN BRUCE, *Judge.*

Service of the above citation is hereby accepted and further notice waived.

L. J. BRYAN,
Marshal, Appellee.

Filed Jan. 14, 1899, at 9.50 a. m.

J. W. DIMMICK, *Clerk.*

UNITED STATES OF AMERICA,
Middle District of Alabama, } ss:

I, J. W. Dimmick, clerk of the district court of the United States for the middle district of Alabama, hereby certify the foregoing pages numbered from one to twelve, inclusive, to contain a true and correct transcript of the proceedings touching the claim and intervention of L. Bernheimer, in the case of A. C. Barler Manufacturing Company, *et al. vs.* D. Abraham, bankrupt, as the same remain on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this the 16th day of January, A. D. 1899.

[SEAL.] J. W. DIMMICK, *Clerk.*

23 United States Circuit Court of Appeals for the Fifth Circuit.

In re D. ABRAHAM, Bankrupt.

LOUIS BERNHEIMER
versus
L. J. BRYAN, Marshal, etc. } No. 797.

Motion to Dismiss Appeal.

Filed February 9, 1899.

And now comes L. J. Bryan, marshal, etc., by G. F. Mertins, his attorney, and moves the court to dismiss the appeal herein, upon the following grounds, viz:

1. For that said order or decree so rendered on the twenty-fourth day of December, 1898, is not such a decree or "judgment" as may be appealed from to this court under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898.
2. For that said order so rendered is a summary order and not appealable to this court.

24 3. For that said order of decree is not a final decree, and is not appealable

4. For that the appeal to this court was allowed before any assignments or error ware filed in the court below.
5. For that no assignments of error were filed in the court below until after the time allowed by law for appeal had passed.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

Filed February 9, 1899.

(*Extract from Minutes.*)

L. BERNHEIMER
vs.
L. J. BRYAN, Marshal. } No. 797.

This cause was regularly called this day and submitted to the court after argument by Mr. Gordon Macdonald for appellant and by Mr. John D. Rouse and Mr. G. F. Mertins for appellees, on the merits as well as on the motion to dismiss.

November Term, 1898.

TUESDAY, *April* 25, 1899.

(*Extract from the Minutes.*)

L. BERNHEIMER, Appellant,
vs.
L. J. BRYAN, Marshal, etc., Appellee. } No. 797.

This cause came on to be heard on the transcript of the record from the district court of the United States for the middle district of Alabama, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said district court
25 in this cause be and the same is hereby reversed and this cause remanded to said district court, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant, Louis Bernheimer, on the seventeenth day of December, 1898, to vacate all orders made thereon, and to restore to the said Louis Bernheimer the goods taken from his possession, and thereafter proceed in accordance with the views expressed in the opinion of this court rendered in this cause, and as equity may require.

Opinion.

Before Pardee and McCormick, circuit judges, and Parlange, district judge.

MCCORMICK, *Circuit Judge:*

On December 12, 1898, the following petition was presented to the district court of the United States for the middle district of Alabama, in bankruptcy:

"Your petitioners, the undersigned creditors of D. Abraham, the bankrupt in this cause, respectfully show unto your honor that heretofore, to wit, on the twelfth day of December, 1898 (same day), upon a petition heretofore filed by them in this cause, the said D.

Abraham was by this court adjudicated a bankrupt within the true intent and meaning of the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' That on, to wit, the twenty-ninth day of October, 1898, and prior to said adjudication, the said D. Abraham executed and delivered unto H. C. Davidson a deed of assignment by which he conveyed unto said Davidson all of his property and effects for the equal benefit of his creditors. That upon the delivery of said deed of assignment to him the said H. C. Davidson entered upon the execution of said trust. That afterward, as required by
26 the laws of the State of Alabama, the said Davidson filed an inventory of all of the property coming into his possession as assignee in the office of the register in chancery of Montgomery, Ala., by which inventory it is shown that the estate of the said D. Abraham consisted mainly of a stock of goods, wares, merchandise and book accounts located in a storehouse number 106 Dexter avenue. That appraisers were appointed by the said register in chancery to appraise said property; and in accordance with said appointment they accordingly appraised all the effects of the said D. Abraham, and made a return thereof to said chancery court; that the appraisement of said property as fixed by said appraisement is the sum of, to wit, $7,900.

"That on, to wit, the 7th day of November, 1898, your petitioners filed in this court their original petition praying that said Abraham be adjudicated a bankrupt upon the ground that he executed and delivered said deed of assignment, and, upon the filing of said petition in this court, your petitioners are advised by counsel, and therefore aver, that this court obtained jurisdiction over said estate of said Abraham, and it was the duty of the said H. C. Davidson, as assignee of said Abraham, to hold all of the property and effects of the said Abraham in his possession, subject to the orders and decrees of this court; but the said Davidson, disregarding the authority and jurisdiction of this court, proceeded to sell and dispose of said property, and did dispose of the same for a sum greatly less than the appraisement as made by said appraisers; that the purchasers of said property have been in possession of the said stock of goods, wares and merchandise for several days, selling and disposing of the same at retail trade, and at such prices as said purchasers claim to be bankrupt prices. Your peti-oners are informed and believe, and upon information aver and state, that said property was sold for greatly less than its value, and that
27 unless this court makes an order requiring that the said property be taken immediate possession of, your petitioners and all other creditors of the said Abraham will be greatly damaged thereby, and the *pro rata* share to which they are entitled out of the effects of the said D. Abraham will be greatly lessened.

"Your petitioners therefore pray that your honor make an order requiring L. J. Bryan, the marshal of the middle district of Alabama, to take charge of all the property and effects belonging to the said D. Abraham at the time of the making of his deed of assignment to the said H. C. Davidson, wherever the same may or can be

found, and further requiring the said H. C. Davidson to deliver to the said L. J. Bryan, as marshal, the books of accounts, papers, choses in action, and any other property or effects which may be in his possession belonging to the said D. Abraham, and further authorizing the said L. J. Bryan, as marshal, to take possession of all the property sold by the said H. C. Davidson, as assignee, to L. Bernheimer, or to any one else, and which is particularly located in said storehouse, known as No. 106 Dexter avenue, in the city of Montgomery, Alabama; and that the said L. J. Bryan, as marshal, be required to hold all of said property so coming into his possession until the further orders of this court."

On the foregoing petition, and on the same day it was presented, the court made the following order:

"The petition of A. C. Barler Manufacturing Company *et al.*, wherein they pray for an order in said cause, requiring L. J. Bryan, the marshal of the middle district of Alabama, to take possession of the property of the bankrupt in this case, coming on this day to be considered by the court; and it appearing from said petition that, after the filing of the original petition in this cause praying that said Abraham be adjudicated a bankrupt, H. C. Davidson, to
28 whom the said D. Abraham had before the filing of the original petition made a deed of assignment for the benefit of all of the said Abraham's creditors, did sell and dispose of certain property and effects of said D. Abraham for a sum greatly less than its value, and without any authority or direction from this court, and that said property is now in possession of the purchasers and being disposed of by them; and it further appearing to the court from said petition that the creditors of the said D. Abraham will be greatly damaged unless said property is taken possession of by this court; and it further appearing from said petition that it is necessary to the interest of the creditors of the said D. Abraham that this court take possession of all the property and effects of the said D. Abraham, now, therefore, it is the opinion of the court that said petition should be granted; and it is accordingly ordered, adjudged and decreed that L. J. Bryan, the marshal for the middle district of Alabama, take immediate possession of all the property and effects owned by the said D. Abraham at the time of the making of said deed of assignment, wherever the same may or can be found, and, further, that he demand and receive from H. C. Davidson as assignee, the books of accounts, papers, or any other effects of said Abraham which may be in the possession of the said Davidson as assignee, and, further, that he demand, receive, and take possession of all the property sold by the said Davidson as assignee to L. Bernheimer, or any one else, and which may now be particularly located in that certain storehouse on Dexter avenue, in the city of Montgomery, and known as No. 106; and that the said L. J. Bryan, as such marshal, hold all such property so coming into his possession until the further orders of this court."

Under this order, and on the same day, the marshal seized the stock of goods then in possession of Louis Bernheimer, the purchaser

at the assignee's sale; and on the marshal's report of the
29 seizure and his petition for instruction in reference to his disposition of the goods, the court on the next day, December 23, 1898, made the following order: "This cause coming on to be heard on the petition of the marshal for instructions in reference to goods seized by him under a former order of this court, and the same being considered by the court, it is ordered that Louis Bernheimer be notified to appear before this court within ten days from the date hereof, and propound any claim he has to the goods so seized, or to any part thereof, or failing therein that he will be decreed to have no claim or right thereto. The marshal is directed to retain possession of all said goods until further orders of this court. The clerk of this court will issue and cause to be served on said Bernheimer a copy of this order."

On December 17, 1898, the petitioning creditors submitted to the bankruptcy court the following:

"Your petitioners, the undersigned creditors of D. Abraham, respectfully show unto your honor that on, to wit, the 29th day of October, 1898, the said D. Abraham did make and deliver a deed of assignment to H. C. Davidson, who is a resident citizen of Montgomery city and county, and State of Alabama and district aforesaid. That thereafter, on, to wit, the 7th day of November, 1898, your petitioners did file in this honorable court a petition alleging that the said D. Abraham had committed an act of bankruptcy in executing said deed of assignment, and asked that the said D. Abraham be declared and adjudged a bankrupt under the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States.' That thereafter, to wit, on the 12th day of December, 1898, said petition coming on to be heard, after a consideration of the evidence the said D. Abraham was by this court duly adjudged a bankrupt within the meaning of said act, aforesaid.

30 "Your petitioners further show that, after the filing of their said petition in bankruptcy against the said D. Abraham, and in disregard of the proceedings therein pending, the said H. C. Davidson did, as your petitioners are informed and believe, on or about, to wit, the seventeenth day of November, 1898, turn over to and deliver to one L. Bernheimer all of the stock of goods which belonged to the estate of the said D. Abraham and which were located in storehouse No. 106 Dexter avenue, in the city of Montgomery, Alabama, said district aforesaid. That thereafter the said L. Bernheimer, who is a resident citizen of the city and county of Montgomery, State of Alabama, and said district aforesaid, did, in disregard of the proceedings pending in this court, proceed to sell, transfer, and deliver, largely for cash, said stock of goods as aforesaid. Your petitioners are informed, and upon such information show that the said stock of goods at the time the said Bernheimer took possession thereof was worth, to wit, the sum of about $10,000. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer sold large quantities of said goods while the same were in his possession, to wit, from November

17, 1898, up to and during December 12, 1898, when the balance of said stock was taken by an order of this court into the hands of the marshal of this court. Your petitioners are informed and believe that the said L. Bernheimer received from said sales and transfers of goods which belonged to the estate of said D. Abraham large sums of money. Your petitioners are informed and believe, and upon such information show that the said L. Bernheimer at the time he took possession of said stock of goods had knowledge of the proceedings in bankruptcy in this honorable court against the said D. Abraham. Your petitioners are advised by counsel, and upon such advice and information show that the said L. Bernheimer, as against these petitioners in bankruptcy, did not and could
31 not acquire title to the property of the said D. Abraham, and that said moneys so received by the said L. Bernheimer from sales and transfers of said property and goods belongs to the estate of the said D. Abraham, bankrupt.

"The premises considered, your petitioners pray that an order may be issued by this honorable court directed to said L. Bernheimer, calling on him to file with the referee in bankruptcy, on a day named, a sworn statement of all moneys which the said L. Bernheimer has received from the sale or transfer of said goods of D. Abraham, owned by him at the time of making his said deed of assignment, as well as such evidences of indebtedness as he may have received from any one for such sales, and that the said referee hold a reference to ascertain and report the correctness of such statement and await the further orders of this court."

The record sent up to us does not expressly show what order was made by the bankruptcy court on this last application of the petitioning creditors. It, however, sufficiently appears from the further action taken that an order was granted in conformity with the prayer.

On December 22, 1898, Bernheimer submitted to the court the following:

"And now comes Louis Bernheimer, and in obedience to the commands of said court issued on the 13th day of December, 1898, and served on said Bernheimer on said date, commanding him to appear before said court and propound his claim to the goods seized by the marshal of said court under a former order of said court in the said bankruptcy proceedings, and propounds his claim thereto as follows:

"That on, to wit, the 29th day of October, 1898, the said David Abraham made a general assignment of all of his property, including said goods seized by said marshal while in the possession
32 of claimant, for the benefit of his creditors; that one H. C. Davidson was named as assignee under said assignment, and was by the terms thereof relieved of giving any bond as such; that on the 7th day of November, 1898, certain creditors of the said Abraham filed their petition in this court asking that said Abraham be adjudged a bankrupt; that after said day and date the same creditors filed their petition in this court praying that said H. C. Davidson, as such assignee, be required to appear before said court

and show cause why he should not be restrained from selling the said goods so assigned to him. That, in obedience to the order issued by said court, said Davidson did appear before the said court, and showing cause satisfactory to the court, said rule was discharged, and said court declined to make the order prayed for restraining him from selling said goods on the ground that said petition was not sworn to and no bond given, and said petition was dismissed without prejudice; that thereupon said Davidson as such assignee proceeded to sell said goods at public auction for cash, in the city of Montgomery; that this claimant being advised by counsel learned in the law, and who were perfectly conversant with all the facts in the case, bought the said goods from the said Davidson at and for the price of three thousand five hundred dollars, which was a fair, just and reasonable price therefor; that claimant paid the said Davidson, as such assignee, the full sum of three thousand five hundred dollars in cash for said goods, and went into immediate possession thereof and has been in the possession of the same until he was deprived thereof by the said marshal under the orders of this court; that claimant never intended to interfere in any way with the process of this court or with any property of said bankrupt, but was advised that he was at liberty to purchase said property under the sale made by said Davidson. Claimant represents to this honorable court that if he is deprived of these goods, and if
33 the said Davidson is allowed to keep the money paid him by claimant as the purchase price of said goods, claimant's position in the premises will be one of great hardship and loss to him; that under the terms of said assignment said Davidson will be compelled to pay the money paid by claimant to him for such goods to the creditors of the said Abraham, including the said creditors who petitioned to have said Abraham declared a bankrupt, and the consequences will be that both the goods which the claimant purchased in perfect good faith and by advice of counsel will be held and sold again for the benefit of said creditors, and the money which claimant paid for said goods will also be used and paid out for their benefit.

"Claimant respectfully submits to the court his claim in this behalf. He asks the court's protection in the premises and that it will issue such rules and orders in the premises as may be necessary to such protection. He further asks that the creditors of said bankrupt estate be remitted to the fund derived by said Davidson from claim for the purchase price of said goods. Claimant prays also that in default of such order, or if he is mistaken in the relief prayed for, that your honorable court will issue a rule that the said Davidson be ordered to pay into this court the full amount derived by him from claimant as purchase-money of said goods, and that same be paid over to claimant, who thereupon offers to rescind said purchase and to waive all further claim to said goods."

On December 24, 1898, Bernheimer made further showing to the bankruptcy court as follows:

"Answer of L. Bernheimer, claimant, to petition requiring him to account for and turn over to the marshal proceeds of sale of certain goods, etc.

"The claimant, Louis Bernheimer, respectfully represents to the court that, as purchaser of the stock of goods formerly belonging to said bankrupt, under a sale thereof made by H. C. Davidson,
34 to whom said bankrupt had assigned said goods, he entered into the possession thereof; that while in such possession, and in the regular course of trade and before the marshal of this court in obedience to its order heretofore issued seized said goods, claimant sold a portion thereof, and received the proceeds of such sales; that the daily sales made by him of such goods were as follows: ——, amounting in the aggregate to two thousand seven hundred and sixty-eight dollars and forty cents; that at the time of the purchase by claimant from said Davidson he also bought the exemptions allowed by law to said bankrupt under the laws of the State of Alabama and under the act of Congress entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898. The amount of said exemption is one thousand dollars, which claimant as such purchaser from said bankrupt claims as exempt from any process for the payment of the debts of said bankrupt. Claimant claims all of said goods as his own under said purchase, as stated in his claim filed under the order of this court on the 22d day of December, 1898, but which was decided against him by this court on said date. And this answer is made without any prejudice to his claim to said goods, but as a part of the proceedings of his said propounded claim; that he has paid out of said sales for expenses of clerks, insurance, and other necessary expenses, the sum of three hundred and ten and $\frac{10}{100}$ dollars, and returned twelve and $\frac{50}{100}$ dollars to purchasers, leaving a net balance of $1,434.80."

To the showings or answers thus made by Bernheimer, the petitioning creditors demurred on the same day each was respectively filed, on the following grounds:

(1 and 7.) Because he shows no title to the property which would be good against their rights.

35 (2.) Because at the time of his alleged purchase the court of bankruptcy had acquired jurisdiction of the property.

(3.) Because at the time of the sale by the assignee, both the assignee and the purchaser had actual knowledge of the filing of the original petition of these petitioners and of the proceedings thereon pending.

(4, 5 and 6.) Because the making of the deed of assignment was as act of bankruptcy, void as to these petitioning creditors.

(8.) Because this court has no jurisdiction to try and determine questions between the assignee and the purchaser at the assignee's sale.

On December 24, 1898, the court of bankruptcy entered its decree as follows:

"The matter of the claim of Louis Bernheimer to certain goods

in the possession of the marshal of this court, and to the proceeds of the sales of other goods made by said Bernheimer belonging to the estate of said bankrupt, coming on this day to be heard on the said claims and on the demurrers thereto filed by the petitioning creditors in bankrupt proceedings, it is considered by the court that the said demurrers be and the same are hereby sustained; and the said Bernheimer declining to amend or plead further, and facts being made to appear to the satisfaction of the court, it is ordered, adjudged and decreed that the said Louis Bernheimer acquired no title to the said goods or to the proceeds of the sales thereof made by him under the purchase of said goods from H. C. Davidson as assignee of said bankrupt, superior to the title of the creditors of said bankrupt's estate. It is further ordered that the said Louis Bernheimer pay over to the marshal of this court, to await the further orders of this court, all the proceeds of the sales (as may be ascertained by the referee and approved by the court, as stated hereinafter) made by him of any of the goods purchased by him of said H. C. Davidson as assignee of said bankrupt, D. Abra-
36 ham. And that it be, and is hereby, referred to H. Booth, Esq., referee, to hold a reference, giving all parties due notice, and ascertain and report to this court the amount of such proceeds."

On the application and prayer of the purchaser, Bernheimer, for an appeal to the circuit court of appeals, and for the allowance of a supersedeas, the district court made the following order: "And now on December 24, 1898, it is ordered that the appeal and supersedeas be allowed as prayed for."

On the same day the judge approved the bond for appeal and supersedeas. The assignment of errors was filed on January 14, 1899.

McCormick, circuit judge, after stating the case as above, delivered the opinion of the court:

The assignment of errors is to the effect that the court erred in its rulings on the demurrers, and presents this question: Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him to appear before that court within ten days and propound any claim he had to the goods, or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?

The appellee moves to dismiss this appeal (1) because the decree sought thereby to be reviewed is not such a judgment as may be appealed from under the provisions of the bankrupt act; (2) that the order or decree sought to be reviewed is a summary order and not appealable to this court; (3) that the order or decree is not a final decree; and, for that reason, is not appealable.

By the first section of the bankrupt act of 1867, the district courts were constituted courts of bankruptcy, and were given
37 original jurisdiction in all matters and proceedings in bankruptcy, which jurisdiction they were authorized to exer-

cise as well in vacation as in term time, and it was made to extend to all cases and controversies arising between the bankrupt and any creditor or creditors who claimed any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; to the marshaling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters and things to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. To which was added by the act of 22d of June, 1874, that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount.

By the second section the several circuit courts of the United States were given a general superintendence and jurisdiction of all cases and questions arising under the act, and were authorized upon bill, petition, or other proper process of any party aggrieved, to hear and determine the case as a court of equity, except when special provision is otherwise made in the act. This power and jurisdiction was to be exercised either by the court or by any justice thereof, in term time or vacation. The circuit courts were also given concurrent jurisdiction with the district courts of all suits at law or in equity brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person
38 against the assignee, touching any property or rights of property of the bankrupt, transferable or vested in such assignee.

This last provision as amended by the act of June 22, 1874, now appears as sec. 4979 in the Revised Statutes.

By sec. 8 it was provided that appeals may be taken to the circuit courts in all cases in equity, and writs of error may be allowed from the circuit courts to the district courts in cases at law under the jurisdiction created by the bankrupt act when the debt or damage claimed amounted to more than five hundred dollars; and any supposed creditor whose claim was wholly or in part rejected, or an assignee who was dissatisfied with the allowance of a claim, could appeal from the decision of the district court to the circuit court, on certain terms, conditions, and limitations not necessary to notice here.

By sec. 9 it was provided that in cases arising under the act, no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed $2,000. (Amended by act of February 6, 1875, so as to read $5,000.)

At the time of the passage of this act, the conditions in this

country were unprecedented. The immense proportions of the civil war, the suspension of specie payments, the volume of paper currency issued by the National Treasury and national banks, the large disbursements by Government, the destruction by abolition of property in slaves in the fifteen States which had theretofore recognized such property in so many millions of colored people, the throes of reconstruction, and the morbid activity which the liberated energy of more than a million veteran soldiers, with faculties quickened and strung to the highest key by the intensity of the protracted civil strife had stimulated and for a time sustained, had brought our commercial interests to that agonizing crisis of almost universal bankruptcy, which raised a clamor for speedy liquidation.
39 To meet these transcendent conditions, the provisions of the act of 1867 went beyond the terms of any previous law.

When the courts of bankruptcy were opened the office of circuit judge had not been re-established. The dockets of the Supreme Court were large and growing, and severely taxed the time and strength of the circuit justices. Their residence at the national capital then rendered them more remote from and more difficult to be reached by parties to bankruptcy proceedings than it would now. They could visit each district, at the most, once only in every two years for such brief period and labors as their service on the Supreme Bench then permitted. On the tenth day of April, 1869, the office of circuit judge in each of the nine circuits was re-established, and in due time filled by appointment. Thereafter the general superintendence of the circuit court became more efficient, and the jurisdiction of those courts on appeal or writ of error acquired more practical value and was more invoked. Immediately upon the taking effect of the act the dockets of the courts of bankruptcy became crowded. The most able and careful judges of the district court, pressed by urgent conditions and argument, with little call or time to doubt, began to extend summary process and proceedings so as to meet all individual cases presented. The growing weight of precedent thus nourished by their own practically unreviewable, or actually unreviewed decisions carried their jurisdiction to that point where a few years later it became burdensome and dangerous to all persons engaged in agricultural, manufacturing, or commercial pursuits and dealing to any considerable extent on credit. By the aid of the court of bankruptcy, or without its aid, the efforts of individuals to better their position in trade and other industries caused a strong reaction to set in, and the conditions which had excused and rendered tolerable the exercise of exorbitant jurisdiction
40 by the courts of bankruptcy began to disappear. Commercial transactions acquired a more healthy tone. With some variableness of symptoms, and occasional relapses more or less severe, the country was steadily recovering and approaching specie payment and a sound normal basis of dealing and credit. The summary processes and proceedings in bankruptcy were no longer so much needed or used for the relief of honest debtors or the protection of creditors against the fraudulent dealings of dishonest insolvents, but came to be used rather for the too rigorous enforce-

ment of collections against honest and substantially solvent but temporarily embarrassed dealers. Provision had been made for the resumption of specie payments to take effect on January 1, 1879. On the seventh day of June, 1878, Congress passed an act which repealed the bankrupt law, to take effect on September 1, 1878.

Thereupon varying insolvent laws, embracing more or less bankruptcy features, were restored or established in most of the different States. The force of the bankruptcy features of these laws was, of necessity, limited in its operation to the territory of the respective States, except so far as it could be and was extended by the consent of the creditors. It soon became apparent that the country had substantial need of a national act to establish a uniform system of bankruptcy throughout the United States. Strenuous efforts began to be made both in and out of Congress to secure such action on its part as would meet this need. Numerous bills were drawn with elaborate care, studiously constructed on the lines of the previous law and the decisions under it. It was attempted to frame a bill that would be permanent in its beneficial operation, adjust itself to the varying conditions of trade, and be free from all oppressive features or needless rigor. This effort was maintained in Congress from session to session, but the recollection of the effect of
41 summary proceedings in bankruptcy under the act of 1877 was so vivid and repugnant that it prevented or delayed for a period of twenty years the action of Congress so much needed and so urgently sought.

Some cogent reasons combined or coincided to lead the judges of the courts of bankruptcy to take and hold liberal views as to the extent of their jurisdiction in matters of bankruptcy. More than in other matters this jurisdiction appeared to be the jurisdiction of the judge, as distinguished from that of the court. In these matters there seemed to be little room, if any, for such distinction. At any point within his district, and at any time, in term time or vacation, in open court or in chambers, he was authorized to exercise this jurisdiction to an extent and in a manner well calculated to evolve the unconscious or conscious thought that he was the court of bankruptcy. The judge of the court of bankruptcy not only presided alone in the district court in the exercise of all the other jurisdiction of that court, but he could, and generally did preside alone in the circuit court and exercise all the original jurisdiction of that court, except its jurisdiction to take, on due application, a general superintendence of all cases and questions arising in the courts of bankruptcy under the bankrupt act. Thus, where original jurisdiction in bankruptcy proceedings could be conducted in a summary manner the exercise of such jurisdiction was exclusively his, and in all matters affecting the bankrupt's estate, in which legal proceedings were required to be by plenary suit or action when the same were pending in the circuit court, he could, and in actual practice generally did, preside alone. His action in these plenary causes in the circuit court could only be reviewed by the Supreme Court, and by it only in such cases as involved a matter of sufficient amount in value to support an appeal or writ of error. From many

of the districts the Supreme Court was very far away in point
42 of distance; and whether far or near, the day at which it could reach and decide a case on appeal or writ of error was indefinitely remote. Therefore parties and counsel were reasonably inclined to acquiesce in the views of the judge of the court of bankruptcy, even where they were not (as they oftener were than otherwise) interested, and urgent to extend his jurisdiction to meet the exigencies of the case they had or represented. However, after the lapse of some years cases began to reach the dockets of the Supreme Court. And after the substantial final settlement by the subordinate courts of the great bulk of the business that arose under the act, the Supreme Court began to reach the cases on its dockets which involved the construction of the act, and to announce decisions marking the boundaries of the jurisdiction it conferred, and the manner of procedure in its exercise. These decisions settled that most matters and proceedings in bankruptcy were to be heard and adjudicated in a summary way, but that the general jurisdiction thus to proceed did not extend to controversies by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of the bankrupt transferred to or vested in the assignee; that such controversies, where they could not be settled otherwise than by legal proceedings could be prosecuted only by plenary suits at law or in equity. Smith *vs.* Mason, 81 U. S. (14 Wall.), 419, December term, 1871. Of these plenary suits the circuit courts were given concurrent jurisdiction with the district courts of the same district. This language of sec. 2 necessarily implies, either that the district court had jurisdiction in such matters under the general grant in sec. 1, or it confers such jurisdiction on that court. It was held in Goodall *vs.* Tuttle (7 B. R., 193), that sec. 2 did not confer it. It seems also to imply that only the circuit courts and the district courts had
43 original jurisdiction in such cases. It doubtless so appeared to the commissioners who prepared the revision of the statutes of the United States, and to the committees of Congress which examined the same before it was adopted by an act approved June 22, 1874, for in sec. 711 of the revision it is declared: "The jurisdiction vested in the courts of the United States in cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States; * * * sixth, of all matters and proceedings in bankruptcy." And in the act of June 22, 1874, amending the act of 1867 it was, as we have seen, deemed necessary to provide that the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount. The reason for this provision doubtless was that the general original jurisdiction of the Federal courts was limited to controversies involving matter in value to the amount of five hundred dollars or more.

In one case decided at the October term, 1875, it was assumed in the opinion of the court, that the State courts, may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts which had vested in the assignee in bankruptcy. Lathrop *vs.* Drake, 91 U. S., 516. At the same term it was held that the jurisdiction conferred upon the Federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the State courts in suits of which they had full cognizance. Eyster *vs.* Gaff, 91 U. S., 521.

As highly instructive and pertinent to our inquiry, we quote some of the language of the opinion in the case last cited:

44 "The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

"The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts."

The same questions were involved in other cases pending in the Supreme Court, and at the next term (October term, 1876), were elaborately argued by counsel, closely scrutinized by the court, and fully discussed in its opinion prepared and delivered by the same judge who had been the organ of the court in delivering its opinion in Lathrop *vs.* Drake, and the doctrine which was assumed in the opinion in that case, and which was distinctly held in Eyster *vs.* Gaff was adhered to; and the general principle was announced,

45 that where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever by their own constitution they are competent to take it (Claflin *vs.* Houseman, 93 U. S., 130).

By the second section of the act of July 1, 1898, the district courts as courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation in chambers and during

their respective terms, to * * * (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It is provided by sec. 23:

"*a*. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

"*b*. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By sec. 67*e* it is provided that all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the pro-
46 visions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings, or otherwise, for the benefit of the creditors.

It is provided by sec. 26*a*: "The trustee may, pursuant to the directions of the court, submit to arbitration any controversy arising in the settlement of the estate." Sec. 27*a*: "The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

By clause (3) of sec. 2 the courts of bankruptcy have authority to "appoint receivers or the marshals upon application of parties in interest in case the court shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." * * *

By clause (3*e*) it is provided: "Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or

applicant shall file in the same court a bond with at least two
47 good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

Section 69*a* provides: "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected, or is neglecting, or is about to so neglect his property, that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold its subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained."

Trustees are vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt; with exceptions not necessary to notice. (Section 70.)

Trustees thus vested with title are charged to collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expedi-
tiously as is compatible with the best interest of the parties
48 in interest (sec. 47*a*, clause 2). And receivers or the marshal may be appointed to discharge the duties of trustees until trustees are appointed.

We have thus grouped together the provisions of the present law which appear to bear on the subject of our inquiry. We have noticed in the opening part of this opinion the extensive and apparently exclusive jurisdiction that was given by the act of 1867 to the national courts over the subject of proceedings in bankruptcy and of cases arising out of such proceedings. Under the present act, if the bankrupt has his principal place of business, resides or has his domicile in the United States, the adjudication of his bankruptcy and the proceedings therein must be in the district where he has so had his principal place of business, his residence or his domicile for the preceding six months or the greater portion thereof. The general rule is that a person can be sued in the United States courts only in the district whereof he is an inhabitant, and no suit can be brought in those courts unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. It is therefore apparent that, as a general rule, all controversies at law

and in equity, as distinguished from proceedings in bankruptcy between trustees as such (or other duly appointed and empowered representatives of the bankrupt's estate) and adverse claimants concerning the property acquired or claimed by the trustees (or other duly appointed and empowered representatives of the estate), which cannot be or are not adjusted by negotiation, arbitration or compromise, must be abandoned by the trustees or adjudicated in the State courts, unless by consent of the proposed defendant suit can be brought in a United States court.

If we concede or assume that the making of a deed of general assignment within four months of the adjudication in bankruptcy, which by the express terms of the law is an act of bank-
49 ruptcy, wholly invalidates the deed so that no title can pass thereby as against the grantor's creditors, no matter what may be its terms or the avowed and apparent intent of the parties as shown by the deed (a concession which we are not now prepared to make, and do not make except for the purpose of the argument), the property and assets thereby attempted to be conveyed are precisely such assets and estate as it is made the duty of the trustee to recover and reclaim "by legal proceedings or otherwise." Whatever the words "or otherwise" may embrace, it can hardly be seriously contended that they embrace such summary proceedings in bankruptcy as the issuance of a special warrant to the marshal to seize the goods, and the service of a rule upon the claimant to come before the court of bankruptcy and render an account and make restitution for the value of any portion of such goods so attempted to be transferred to him which have been sold or otherwise disposed of by him. Such a construction would render more than nugatory surplusage the language "by legal proceedings." If, therefore, we were restricted in our view to the terms of section 67*e*, it would clearly appear therefrom that "by legal proceedings" must be intended controversies at law and in equity, as distinguished from proceedings in bankruptcy. But our view is not limited to the terms of section 67*e*.

Conceding that the deed of assignment is invalid, and that no title passed to the assignee, or from him to the adverse claimant as against the grantor's creditors, then such title as the bankrupt had at the time of making the assignment vested fully in the trustee, and might, and doubtless often would be surrendered to him on demand. If such demand was refused, the act itself, as we have seen, provides for arbitration or compromise of the controversy. If these fail and resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which
50 the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery, in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him. He would have a right to sue and to show, if he could, that title did not pass by the making and delivery of the deed. That is precisely what the trustee has to show, or, to state it more guardedly, the converse of that is precisely what the adverse claimant has the right to try to show,

namely, that title did pass to him under the deed and by the subsequent action of the assignee.

As already intimated, no question as to the validity or invalidity of the title of Bernheimer to the goods which he claims to have acquired from the assignee under the deed of assignment is now before us, or in any manner to be concluded or affected by what we decide, or what we say in deciding the question of law that we are considering and which we stated at the opening of this opinion to be, Did the district court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizure of the goods, and a rule to account entered against the adverse claimant? It seems clear to us that under the act of 1867 the district courts, as courts of bankruptcy, were not invested with jurisdiction to proceed in that way in such cases as this, and that the whole tenor of the present law forbids the assumption and exercise of such jurisdiction.

We are now to consider more directly the questions presented by the motion to dismiss.

By the act to establish circuit courts of appeals, this court has appellate jurisdiction to review by appeal, or by writ of error, final decision in the district courts in all cases other than those in which
appeals or writs of error may be taken direct to the Supreme
51 Court unless otherwise provided by law. Appeals may also be taken to this court in the same cases from certain interlocutory orders or decrees rendered by the district court.

By sec. 25*a* of the present bankruptcy law appeals may be taken in equity cases in bankruptcy proceedings from the courts of bankruptcy to this court in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge, and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by this court in term time or vacation, as the case may be.

The judgment, order or decree appealed from in this case is not embraced in either of the three classes of cases as just recited from the statute. It was not rendered on an original independent bill in equity, nor in a proceeding ancillary thereto. If considered in reference alone to its terms, its provisions for being put into immediate execution, if not in effect self-executing, give it the elements of a final decree within the statutes and decisions under which appeals are taken from decrees in ancillary proceedings in an equity suit.

We do not, however, consider it necessary in this case to decide whether an appeal can be taken from that judgment as from a final decree in equity.

Sec. 24*b* provides: "The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power

shall be exercised on due notice and petition by any party aggrieved."

The second section of the act of 1867 provided that the sev-
52 eral circuit courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under the act, and, except when special provision is otherwise made, may, upon bill, petition or other proper process of any party aggrieved, hear and determine the case as a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof, in term time or vacation. By sec. 8 of that act it was provided that appeals may be taken from the district court to the circuit court in four classes of cases named, but that no appeal shall be allowed unless it is claimed and notice given thereof within ten days after the entry of the decree or decision appealed from.

In a case presented to the circuit court in which Chief Justice Chase was at the time presiding, it appeared that certain judgments or orders were rendered by the district court on the 16th of March, 1869; that the petitioners, as soon as these orders came to their knowledge, prayed an appeal in the name and with the approval of the assignees, and immediately gave notice of their appeal. The time for filing the bond on appeal was extended by the order of the district judge until the 18th of April, and on the 14th an order was passed showing that the assignees had filed their bond in the penalty of $10,000. On the 6th of May, the assignees informed the counsel for the petitioners that they would not allow the use of their names in the prosecution of this appeal. "The petitioners therefore ask (the date of presenting their petition does not appear in the opinion) in consideration of the surprise occasioned to them by this information, and also upon the ground that no appeal from the order of the district judge in such a case as that before him is allowed by the act, that the court will give them leave to file their petition now presented and grant them appropriate relief." The Chief Justice reviewed the provisions of the statute, and held
53 that the order mentioned in the petition was one from which no appeal could be taken, and drew the inevitable conclusion "that it is one which may be reviewed in the exercise of the power of general superintendence, or that it cannot be reviewed at all." He then proceeds to discuss the power of general superintendence conferred on the circuit courts, and concludes his review thereof thus: "The exercise of this general jurisdiction is not placed by the act under specific regulations and restriction like the proceeding by appeal or writ of error. It was doubtless thought most advisable to leave its regulation to the discretion of the court and to the rules to be prescribed by the Supreme Court. As yet the Supreme Court has prescribed no rule concerning it, nor has this court." Leave was granted to file the petition. *In re* Alexander, Third Bankruptcy Register, p. 6.

The general orders in bankruptcy adopted and established by the Supreme Court "under the powers conferred by the Constitution

and laws on the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,'" prescribe no rules or forms to guide or govern the exercise of this jurisdiction by the circuit court of appeals. If we may, or should, establish some rule or rules to regulate the same, we have not done so. In this connection we again quote the language of Chief Justice Chase in the case last cited: "In the case before us its exercise must depend on the sound discretion of this tribunal. Unreasonable delay in invoking the superintending jurisdiction should certainly not be allowed; nor, on the other hand, should such excessive rigor be exercised that the ends of justice will probably be defeated."

In the exercise of this discretion we must, of course, keep in view the terms of the statute. It declares that the jurisdiction is
54 in equity, that it is either interlocutory or final, and to be exercised only in matter of law. It prescribes no mode other than that it shall be on due notice and petition of any party aggrieved. In the general orders in bankruptcy above referred to there are both rules and forms for the framing of petitions, but they relate to petitions as defined in section 1, clause (20), which reads: "'Petition' shall mean a paper filed in a court of bankruptcy with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named." The words "due notice" do not prescribe the time or manner of giving the notice or the parties to whom it is to be given.

All the courts which are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings are authorized to exercise their jurisdiction in term time or vacation, as the case may be. By rule 36 of general orders in bankruptcy it is provided that "appeals from a court of bankruptcy to a circuit court of appeals * * * shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States."

The right of appeal as given by the statute can neither be enlarged or restricted by the district court or by this court. The regulation of appeals is a regulation of jurisdiction. It was not without purpose, therefore, that the exercise of the superintending jurisdiction of this court is not placed by the act under specific regulations and restrictions like the proceeding by appeal or writ of error.

It seems clear to us, from a consideration of the various provisions of the act, and particularly of the clause conferring superintending and revising jurisdiction on this court, that it was the in-
55 tent of Congress that the exercise of such jurisdiction could be easily invoked by any party aggrieved, and should be freely exerted by the circuit courts of appeals without the hindrance of technical trammels. In the analogy to the rule prescribed for allowing appeals, and to the practice in allowing writs

of error in cases at law, the petition for revision may be presented to and allowed by a judge of the court of bankruptcy or any one of the judges of this court. It should with reasonable clearness show the action of the court which it seeks to have revised in matter of law, and reasonable notice thereof should be given to the adverse party. The appeal prayed for, allowed and perfected in this case, bringing up, as it does, the record of the pleadings, which present all the facts, either verified by the petitioning creditors, whom the appellee represents and cannot be allowed to dispute, or averred by Bernheimer and admitted by the demurrer, showing all of the action of the judge thereon, including the last order from which the appeal was taken, may embrace more than it was necessary to put into a petition for revision, but it clearly does embrace a sufficient statement of the facts and action of the court thereon sought to be revised in matter of law. No question has been raised or can be raised as to the sufficiency of the notice. It is apparent from the proceedings that the appeal was prayed for and allowed in open court in the presence of all the parties or their attorneys, at the very instant that the judgment sought to be revised was announced. They thus had, or must be charged with due notice. We conclude that the motion to dismiss the proceedings in this court should not be granted.

We could, did we deem it necessary, permit the party aggrieved now to file his petition for the revision he seeks, and, upon due or reasonable notice thereof being given to all parties entitled thereto, proceed thereon in the exercise of our jurisdiction. We have not deemed it necessary or meet in this case to have resort to
56 that course, but have proceeded to consider the case on its merits in like manner as if a formal petition had been presented and due notice thereof given. We may not feel justified in exercising our discretion to the same extent in all cases which may be brought to us in the future. The proceedings in this case in the district court were had before the general orders in bankruptcy took effect or had been widely published and become generally known to parties or counsel, or the judges of the inferior courts. The provisions of the act with reference to appeals to this court and to obtaining the superintendence and revision it may exercise are in a measure new, and precedents under the former law, if they were uniform (which they are not), could not be safely followed.

It appears from the record that the deed of assignment to Davidson was executed and delivered on October 29, 1898; that the assignee at once entered upon the execution of the trust, and, as required by the laws of the State of Alabama, filed in the proper State court an inventory of the property, which consisted mainly of the stock of goods in controversy in this proceeding, and appraisers were duly appointed, who appraised all the effects covered by the assignment and made return thereof to the State court; that on November 7, certain creditors of Abraham filed their petition in the court of bankrupt-y, praying that Abraham be adjudged a bankrupt; that thereafter the same creditors filed another petition in that court praying that Davidson be required to appear before

the court and show cause why he should not be restrained from selling the goods so assigned to him; that in obedience to this order he did appear and show cause satisfactory to the court; that the rule against him was discharged, and the court declining to grant the restraining order, on the ground that the petition therefor was not sworn to nor any bond given, dismissed the petition without prejudice; that thereupon Davidson, as
57 assignee, proceeded to sell the goods for cash in the city of Montgomery; that Bernheimer bought the same for the price of $3,500, which he paid in cash, and went into immediate possession of the goods, on November 17; that, claiming to be the purchaser and owner of the goods, Bernheimer proceeded from day to day to sell portions of the same in the regular course of business from November 17 up to and during December 12; that on December 12 the marshal seized under the special warrant on that day issued out of the court of bankruptcy that portion of the goods still remaining in Bernheimer's possession; that during the time Bernheimer was in the possession of the stock of goods he made sales thereof to the gross amount in value received therefor of $2,768.40; that at the time of his purchase from Davidson, Bernheimer bought from Abraham the exemptions allowed by the law of Alabama, the State of the bankrupt's domicile, amounting to the sum of $1,000; that during the time Bernheimer was making sale of the goods purchased from Davidson he paid out for clerks, insurance, and other necessary expenses, the sum of $310.10, and returned to purchasers the sum of $12.50; that these three sums, $1,000 paid the bankrupt for his exemptions, the $310.10, and the $12.50, aggregating $1,322.60, leave a net balance of cash received by him from the sale of the goods purchased and received from Davidson of $1,445.80; that the goods seized are now in the custody of the marshal (the appellee), held for the benefit of creditors.

The application of the petitioning creditors for the special warrant obtained in this case, having been made on the same day, but after Abraham was adjudged a bankrupt, does not bring them within the letter of sec. 3*e*, nor of sec. 69*a*, the provisions whereof do not, therefore, literally denounce against them the penalty therein prescribed for wrongfully obtaining thereunder the seizure of the property of an alleged bankrupt; but, in the light of
58 the construction which should be placed, and which we have placed on the provisions of the bankrupt law, their application for the writ to seize, and the seizure thereunder of the goods in controversy, was a flagrant violation of those provisions. Therefore, upon adjudging, as we do, that their application and the issuance of the writ thereon was wholly unwarranted, the seizure and holding of the goods unlawful, and that the possession thereof must be restored to the adverse claimant, it is our opinion that he should be allowed all costs, counsel fees and damages occasioned by such seizure, taking and detention of the property so adversely claimed and held by him; the counsel fees, costs, expenses and damages to be fixed and allowed by the court of bankruptcy and to be paid by the petitioning creditors; to secure the payment

whereof Bernheimer should be allowed a lien on whatever distributive share they may be entitled to receive out of the bankrupt's estate. It is our duty to prevent the springing up of a practice that will extend summary process and proceedings in bankruptcy to controversies between trustees or other parties to the bankruptcy proceedings and adverse claimants. Under the act of 1867 such a practice was prevalent in many quarters at one time, but it rested on opinions taking a view of the provisions of that act against which, as we have seen, the Supreme Court steadily set its face. As we construe the provisions of the present law, they not only do not admit of such a view or authorize such a practice, but carefully guard against it and forbid it.

It is ordered and decreed that the order, judgment and decree appealed from, rendered on December 24, 1898, be and the same is hereby reversed; and the cause is remanded to the district court sitting in bankruptcy, with instructions to dismiss the petition of the creditors of D. Abraham, bankrupt, filed against the appellant,
Louis Bernheimer, on the seventeenth day of December,
59 1898, to vacate all orders made thereon, and to restore to the
said Louis Bernheimer the goods taken from his possesion, and thereafter proceed in accordance with the views expressed in this opinion and as equity may require.

Dissenting Opinion.

PARLANGE, *District Judge:*

The matter which the record in this case presents for decision is whether the creditors of the bankrupt could proceed summarily in the court of bankruptcy, to compel the purchaser at the sale of the bankrupt's property by the assignee, to deliver the property or its proceeds to the court of bankruptcy. Incidentally the right of the purchaser to appeal to this court is contested.

I concur fully in the conclusion reached by this court on the matters just stated, and which are, in my opinion, the only matters before this court for decision. The able and exhaustive opinion of the court shows that the court of bankruptcy was devoid of jurisdiction when proceeding against the purchaser as it did, and that the State court is the proper forum to settle the dispute between the purchaser at the assignee's sale and the bankrupt's creditors.

The opinion of this court also shows that the purchaser, in coming to this court, mistook his remedy. It is clear that he should have proceeded by petition and not by appeal. I agree fully that the indulgence of this court in treating, of its own motion, the appeal as a petition, is just and proper for the reasons stated in the court's opinion.

But I am constrained to dissent as to the intimation that the court of bankruptcy could not have taken possession of the bankrupt's estate, prior to the sale and while it was in the hands of the assignee; and I must further dissent from the direction to the court of bankruptcy to proceed to decree damages, counsel fees and cost against the creditors.

60 The question whether a court of bankruptcy has power to take the bankrupt's property from his assignee is not before this court. The courts of appeals for the second and eighth circuits have, without a dissent, held that the court of bankruptcy may take the property from the assignee and both courts referred, in their own able opinions, to the equally able opinion of Judge Brown (*In re* Gutwillig, 90 F. R., 475). The will of Congress in matters of bankruptcy is paramount. On such a subject a State statute could not prevail; and it is difficult to comprehend how an individual may defeat, or even impede, the will of Congress. The assignee is the bankrupt's agent. I do not see how the court of bankruptcy is deprived of power over the bankrupt's property because it is found in the hands of the bankrupt's agent.

Be this as it may, it seems to me that the case before the court does not call in any manner for an opinion on the point, and that it would be wiser to defer a determination concerning it until it should come up as a contested issue.

It also seems to me that the court of bankruptcy should not be directed to proceed to impose damages, counsel fees and costs on the creditors. There is no such demand before us, neither in the pleadings nor in the briefs. Litigants are usually careful to ask for all that they believe themselves entitled to or that there is any probability of their recovering. They often ask too much, and very seldom, if ever, ask too little. While I agree fully, as has already been stated, that a proper indulgence has been shown the appellant in view of the inevitable uncertainty attendant upon the putting into operation of a new and complex law, I believe that some indulgence should also be shown the creditors, or at least this court should not be so rigorous toward them as to impose upon them damages, etc., which have not been asked for.

61 I do not understand this court to hold that creditors cannot recover the bankruptcy property or its proceeds from the purchaser. This court holds that such recovery cannot be had by summary proceedings in the court of bankruptcy. It is evident that this court would not undertake to say what the State should decide if a suit is brought there to recover the property or its proceeds from the purchaser. It may be that the State court will take the view that the sale is voidable.

Sec. 69 and sec. 3*e*, referred to in the opinion of the court, both relate to bonds given to secure an alleged bankrupt against damages which may result to him from the seizure of his property. Neither section is intended to secure a person situated as is the purchaser in this case. No bond was given under either section. The bankrupt is not complaining of damages to his property. If bonds had been given under either of the sections just mentioned, he alone could have availed himself of them.

Furthermore, I am far from being certain that the court of bankruptcy has jurisdiction to try the question of damages. As the court of bankruptcy has no jurisdiction to entertain the proceeding of the creditors, it is difficult to see how that court has jurisdiction to inflict damages in that same matter. The Supreme Court has

said that a court which has no jurisdiction of a case cannot even award costs or order execution for them to issue. Mayor *vs.* Cooper, 6 Wall., 247; Smith *vs.* Whitney, 116 U. S., 175; Elk *vs.* Wilkins, 112 U. S., 98.

Under the very views so very ably expressed by this court as to the restricted powers of the court of bankruptcy. I have grave doubt, to say the least, with regard to the power of the court of bankruptcy to cause to be framed and to determine an issue between the creditors and the purchaser as to the damages.

62 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing seventy pages, numbered from *a* to 69, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court in the case of *In re* D. Abraham, bankrupt; Louis Bernheimer, appellant, *vs.* L. J. Bryan, marshal, for use of creditors, No. 797, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this eighth day of November, A. D. 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

63 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Louis Bernheimer is appellant and L. J. Bryan, marshal, &c., is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the middle district of Alabama, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do
64 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

65 [Endorsed:] Supreme Court of the United States. No. 297. October term, 1899. L. J. Bryan, marshal, &c., *vs.* Louis Bernheimer. Writ of certiorari. Received Nov. 4, 1899. J. M. McKee, cl'k.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

In obedience to the command of the within writ and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I, J. M. McKee, clerk of said court, do, as a return to said writ, hereby transmit to the honorable the Supreme Court of the United States a true, full, and perfect transcript of the record and all proceedings had in said court in the cause wherein Louis Bernheimer was appellant and L. J. Bryan, marshal, &c., was appellee, as fully and completely as the same remains of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said United States circuit court of appeals for the fifth circuit, at the city of New Orleans, this November 8th, 1899.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No., 17,411. Supreme Court U. S., October term, 1899. Term No., 297. L. J. Bryan, as marshal for the use of creditors, petitioner, *vs.* Louis Bernheimer. Writ of certiorari and return. Filed November 13th, 1899.